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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BETHANY CONSTRUCTION,
CONSULTING AND MANAGEMENT,
INC.,

Plaintiff, Cross-defendant and
Respondent,

v.

MICHAEL KAPLAND et al.,

Defendants, Cross-
complainants and Appellants.

B286749

(Los Angeles County
Super. Ct. No. SC124059)

APPEAL from an order of the Superior Court of Los Angeles County, Nancy L. Newman, Judge. Reversed with directions.

Anderson Yeh, Edward M. Anderson and Regina Yeh for Defendants, Cross-complainants and Appellants.

Myers, Widders, Gibson, Jones & Feingold, Michael S. Martin and Eric R. Reed for Plaintiff, Cross-defendant and Respondent.

Michael Kapland and Kathryn Carter, defendants and cross-complainants, appeal from an order denying their motion for relief from a default judgment entered in favor of plaintiff and cross-defendant Bethany Construction, Consulting and Management, Inc. (Bethco). We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Factual Underpinnings of the Lawsuit

Kapland and Carter, who are married to one another, own a home at 17850 Vicino Way in Pacific Palisades. They hired a contractor to do work on the decks and deck drains on their property. That contractor performed the work incorrectly, necessitating repairs and mold remediation. Kapland and Carter's insurance adjuster recommended that they hire Bethco both to perform the repairs and to serve as an expert witness in the dispute with the original contractor.

On May 16, 2014, Kapland¹ entered into a contract with Bethco. The contract specified the work to be done and an

¹ Bethco submitted its proposal to "Mr. & Mrs. Michael Kapland." Only Kapland signed the acceptance of contract. Bethco brought its breach of contract cause of action against Kapland only. The judgment was joint and several as to the

estimated cost of \$295,973.77. The contract required a \$1,000 deposit upon execution, monthly progress payments, and a final payment upon completion. The parties executed a series of change orders which increased the cost to \$330,766.97.

By October 2014, Bethco had submitted invoices totaling \$229,486.93, and Kapland and Carter had paid \$178,382.37. Bethco submitted additional invoices for \$45,854.56 in connection with work done on the property and \$5,250 in connection with Bethco's expert witness services. Bethco made demands for payment, to which Kapland and Carter did not respond.

Kapland and Carter identified a number of unresolved issues with Bethco's work and invoices. They believed Bethco had performed defective work using inadequate materials, resulting in leaks and electrical problems. They had paid Bethco for work undertaken by a subcontractor, R.J. Laun, but R.J. Laun was suing Kapland and Carter for payment. Further, Kapland and Carter had paid Bethco for insurance coverage, and it appeared Bethco was charging them for its entire insurance premium, not merely for coverage related to the work being done on their property. Finally, Bethco failed to provide them with substantiation for a number of charges when requested to do so.

On December 10, 2014, Bethco sent Kapland and Carter a letter demanding progress payments within 30 days pursuant to Civil Code section 8800 in order to avoid liability for interest and/or court costs. On December 18, 2014, Bethco ceased work on the property.

breach of contract cause of action, which Kapland and Carter challenge on appeal.

II. The Lawsuit

A. *Bethco Files a Complaint, and Kaplan and Carter Retain Attorney Nicholas B. Spirtos*

Bethco filed this action on April 21, 2015, alleging causes of action for breach of contract, services provided-agreed price, services provided-reasonable price, book account, and foreclosure of a mechanic's lien.²

Kaplan is an attorney, but he does not practice in the area of construction law. He initially filed an answer on behalf of himself and Carter, denying the allegations of the complaint and asserting a number of affirmative defenses.

On October 13, 2015, Kaplan and Carter retained attorney Nicholas B. Spirtos, who was experienced in construction law. Spirtos substituted in as attorney for Kaplan and Carter on October 19, 2015.

B. *Spirtos Files a Cross-complaint but Fails To Respond To the Majority of Bethco's Discovery Requests*

On January 22, 2016, Bethco's counsel served Kaplan and Carter with special interrogatories, form interrogatories, requests for admissions, and requests for production of documents. Kaplan and Carter failed to respond within the statutory time period. Also on January 22, Bethco's counsel noticed depositions of Kaplan and Carter for March 2 and 3, 2016.

Spirtos called Bethco's counsel on February 29, 2016, requesting that the depositions be rescheduled for mutually

² As previously stated, Bethco asserted the breach of contract claim against Kaplan only. It asserted the remaining causes of action against both Kaplan and Carter.

convenient dates. When counsel agreed, Spirtos said he would call the following week to schedule the depositions. Spirtos failed to do so, and he failed to return phone calls regarding scheduling the depositions.

On March 10, 2016, Bethco's counsel sent Spirtos a meet and confer letter regarding the depositions and re-noticed the depositions for March 24 and March 25. On March 16, Bethco's counsel wrote to Spirtos to meet and confer regarding Kapland's and Carter's failure to respond to the discovery requests. Spirtos did not respond to either letter. However, late in the afternoon on March 23, Spirtos called counsel and stated he was unexpectedly unavailable for the depositions scheduled for the following two days because he was having health issues. He agreed to contact counsel the next day with available dates but again failed to do so. Late that day, counsel re-noticed Kapland's and Carter's depositions for April 14 and 15, 2016 and notified Spirtos of that fact.

Spirtos filed a motion for leave to file a cross-complaint on March 28, 2016.

Bethco's counsel called Spirtos on April 13, 2016 to confirm the depositions scheduled for the following days. Spirtos called back late that afternoon to say that neither he nor his clients would appear for the depositions. Again, he blamed health issues. Kapland and Carter did not appear for their depositions. Bethco's counsel took Kapland's nonappearance on April 14 and canceled the court reporter scheduled for April 15.

Bethco's counsel filed a motion to compel discovery responses and a request for sanctions on April 18, 2016. At the April 20, 2016 hearing on the motion for leave to file a cross-complaint, the trial court granted the motion. Spirtos indicated

that he would provide discovery responses by May 6, 2016. The trial court ruled that if the responses were received, it would take Bethco's motion to compel off calendar.

Sirtos filed the cross-complaint on April 20, 2016. It alleged causes of action for breach of contract, negligence, and violation of the Contractors License Law. Sirtos also provided the discovery responses, and Bethco took its motion to compel off calendar.

On August 30, 2016, Bethco filed a motion to compel Kaplan and Carter to appear for depositions and a request for sanctions. Sirtos did not oppose the motion. Following a hearing on October 5, 2016, at which Sirtos did not appear, the trial court granted the motion. It ordered Kaplan and Carter to appear for depositions on November 9 and 10, 2016, and it awarded Bethco sanctions in the amount of \$2,252.

When Sirtos began representing Kaplan and Carter, Carter telephoned him regularly to check on the status of the case. Eventually, Sirtos convinced Kaplan and Carter to allow him to provide affirmative updates when needed rather than to call him regularly and incur unnecessary legal fees. The last time they heard from him was October 5, 2016. Sirtos did not tell them at that time about Bethco's attempts to take their depositions, the motion to compel, or the award of sanctions against them.

On October 24, 2016, Bethco's counsel served Carter with special interrogatories and requests for production of documents by sending them to Sirtos. Sirtos did not respond.

On the afternoon of November 8, 2016, the day before the scheduled depositions, Sirtos called Bethco's counsel to say that he and his clients were unavailable for the depositions because

his father had suffered a seizure and was being hospitalized, and Spirtos needed to be with him. Spirtos said he would contact counsel the following week to reschedule the depositions. Counsel responded by letter with suspicion, “given this is the fourth occasion your client’s [sic] have not appeared for their scheduled depositions. Therefore, I am going forward with the depositions as noticed. If your clients do not appear, I will place their non-appearances on record with the court reporter. [¶] If your clients, in fact, do not appear for their depositions, then early next week I will attempt to meet and confer with you regarding our intent to file a motion for terminating sanctions. Toward this end, I am requesting you provide me with evidence of your father’s medical emergency and with an explanation as to why you were required to be with him, and not with your clients at their depositions. [¶] In the meantime, the \$2,252 sanction is required to be paid by tomorrow, November 9, 2016 since that is 30 days from the date of the Notice of Ruling. Please let me know how you intend to pay the sanction.”

Bethco took Kaplan’s and Carter’s non-appearances on November 9 and 10, 2016. Counsel sent Spirtos a meet and confer letter on November 15 but received no response.

C. *Bethco Obtains Terminating Sanctions Based on the Failure To Comply with Discovery, Takes Kaplan’s and Carter’s Defaults, and Obtains a Default Judgment*

On December 27, 2016, Bethco filed a motion for terminating and monetary sanctions based on Kaplan’s and Carter’s failure to appear at their scheduled depositions on November 9 and 10, their failure to produce requested

documents, and their failure to pay the sanctions previously imposed by the trial court.

Sirtos filed no opposition to the motion. On February 9, 2017, the trial court granted the motion. The court struck Kaplan and Carter's answer and cross-complaint and entered their defaults. It ordered Bethco to submit a request for entry of default judgment package. The court explained: "While the court recognizes that terminating sanctions is a harsh remedy, a review of the record shows that [Kaplan and Carter were] properly served with the court ruling. . . . By not attending the depositions and failing [to] provide responses to written discovery, [Kaplan and Carter] have willfully disobeyed this court's order. Absent compliance with this order, [Bethco] cannot properly prepare its case. In light of this history, there is no reason to believe that any lesser evidentiary sanctions will force [Kaplan and Carter] to comply with their obligations. Moreover, [Kaplan and Carter's] failure to participate by opposing either the motion to compel or the instant motion suggests that [Kaplan and Carter] have abandoned this case." Bethco served a notice of ruling on Sirtos.

Bethco filed its request for entry of default judgment on February 28, 2017. The trial court rejected this request, expressing several concerns over Bethco's calculation of damages. Bethco submitted amended memoranda of points and authorities in support of its request on May 2 and June 6, 2017.

The trial court entered the default judgment on June 6, 2017. It awarded Bethco judgment against Kaplan and Carter, jointly and severally, in the amount of \$167,296.47. This consisted of damages in the amount of \$51,104.56; a two percent progress payment penalty (Civ. Code, § 8800) of \$25,597.35;

interest of 10 percent on the \$5,250 charged for expert witness services, totaling \$1,222.56; reasonable attorney fees of \$88,665 (*ibid.*); and costs of \$815. The judgment also ordered foreclosure on a mechanics' lien on the property in the amount of \$45,854.56 plus interest.

Bethco obtained a writ of execution and an abstract of judgment on August 1, 2017.

D. *Kapland and Carter Move To Set Aside the
Default and/or Default Judgment*

Kapland and Carter returned from a trip to the East Coast in mid-August 2017, and on August 23 opened a letter from Bethco containing the abstract of judgment. From this they learned about the default judgment entered against them on June 6, 2017. Kapland unsuccessfully attempted to contact Spirtos. He then checked the online case summary and learned for the first time of the motions to compel, the motion for terminating sanctions, and the entry of default.

Kapland substituted back into the action on August 23, 2017, representing himself, in pro. per., and Carter. When his attempts to contact Spirtos to find out what was going on were unsuccessful, he hired a process server to go to the addresses he had for Spirtos in an attempt to locate him. The process server also proved unsuccessful.

Kapland and Carter also began searching for new counsel. They contacted Anderson Yeh PC on August 29, 2017. Attorney Edward M. Anderson substituted into the action on behalf of Kapland and Carter on September 13, 2017. Anderson filed an ex parte application for an order staying execution of judgment and quashing and recalling the writ of execution. In his

supporting declaration, he noted he was attempting to locate Spirtos to obtain an affidavit of fault to assist Kapland and Carter in moving for relief from judgment under Code of Civil Procedure section 473. Spirtos had not responded to his attempts. The trial court granted a 30-day stay.

On October 5, 2017, Kapland and Carter filed their motion to vacate the default and default judgment pursuant to Code of Civil Procedure section 473 (section 473), subdivisions (b) and (d), and the court's inherent equitable powers. They also sought to quash the writ of execution and vacate any levies against them. They argued that if they were able to obtain an affidavit of fault from Spirtos, they would be entitled to mandatory relief under section 473, subdivision (b). Even if they did not obtain the affidavit, they claimed they were entitled to discretionary relief under section 473, subdivision (b), based on surprise, excusable neglect, and positive attorney misconduct. Kapland and Carter also claimed they were entitled to relief under subdivision (d) of section 473 and the court's equitable powers based on extrinsic fraud or mistake.

In support of the motion, Anderson documented his continued attempts to contact Spirtos, leaving voicemail and email messages and going in person to Spirtos's office address. These attempts were unsuccessful. Attorney Regina Yeh, Anderson's partner, documented the results of her research regarding Spirtos. She found information that Spirtos's father had died in 1996. She attempted to contact Spirtos through various sources but was also unsuccessful.

E. *The Trial Court's Ruling*

The trial court heard the motion on October 30, 2017. In its tentative ruling, the trial court pointed out that a motion for relief under section 473, subdivision (b), must be made “‘within a reasonable time, in no case exceeding six months, after the judgment or dismissal, order, or proceeding . . . was taken.’” It noted: “[C]ourts have interpreted the clerk’s entry of default as a “proceeding” taken against the party, which marks the beginning of the period, even though the judgment on the default is not entered until later.’ (*Garcia v. Gallo* (1959) 176 Cal.App.2d 658, 669.)” (Italics added.)

The court found that “even though [Kapland and Carter] moved for relief within six months after the default judgment has been entered, the motion was made more than six months after the underlying default was entered, rendering the motion for relief pursuant to [section 473, subdivision (b)] untimely. (*Koski v. U-Haul* (1963) 212 Cal.App.2d 640, 642-643; *Monica v. Oliveira* (1956) 147 Cal.App.2d 275, 276.) Thus, neither discretionary relief nor mandatory relief—assuming [Kapland and Carter] obtain a declaration of fault from Mr. Spirtos—may be granted.” (Italics added.)

With respect to Kapland and Carter’s request for relief based on extrinsic fraud or mistake, the court observed that “[a] judgment ‘may be set aside in equity when it is obtained by extrinsic fraud or mistake. . . . The “essential characteristic” of extrinsic fraud “is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.” . . . Extrinsic mistake is “a term broadly applied when circumstances

extrinsic to the litigation have unfairly cost a party a hearing on the merits. . . .”’ (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1044; see *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471-473.)

Generally, to prevail on an extrinsic mistake theory, the party seeking the relief must show: (1) a meritorious case; (2) a satisfactory excuse for not presenting its claim or defense in the prior action; and (3) diligence in seeking to set aside the order or judgment upon discovery. (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147-1148.)” (Italics added.)

The court noted that relief based on extrinsic fraud or mistake generally is not permitted when a party claims that his or her attorney was at fault, in that the party “is charged with the attorney’s inaction or neglect. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 895, 898; *Seacall Dev., LTD v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 204-205.)” (Italics added.) However, an exception arises where the attorney’s conduct amounted to “ ‘ “positive misconduct,” ’ which has been defined to mean a circumstance when the client was ‘ “unknowingly deprived of representation” ’ or ‘a total failure on the part of counsel to represent the client.’ (*Carroll, supra*, . . . at pp. 899, 900.) Although with positive misconduct, the moving party must show the reliance on the attorney was reasonable under the circumstances. (See *Freedman v. Pac. Gas & Elec. Co.* (1987) 196 Cal.App.3d 696, 708; *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 736; *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 353 (*Orange Empire*); *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 391 . . . ; see also *Carroll, supra*, . . . at p. 898; *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855; *Stiles [v. Wallis]*, *supra*, 147 Cal.App.3d at p. 1148; *Cruz v. Fagor*

America, Inc. (2007) 146 Cal.App.4th 488, 507.) Although ‘[c]lients should not be forced to act as hawklike inquisitors of their own counsel’ (*Daley, supra*, . . . at p. 392), they are required to remain ‘relatively free from negligence’ to obtain this equitable relief. (*Freedman, supra*, . . . at p. 708.)” (Italics added.)

The court found that according to Kapland’s and Carter’s own declarations, they did not speak to Spirtos for 10-and-a-half months before discovering that a default judgment had been entered against them. There was no evidence that Spirtos misled them as to the state of the case. Although Kapland and Carter asserted “that Mr. Spirtos encouraged a relationship where he would contact [Kapland and Carter] rather than encouraging [Kapland and Carter] to contact Mr. Spirtos . . . , the court is not inclined to find that almost a year passing without any communication was reasonable. A simple inquiry in the [10-and-a-half-]month period would have likely revealed the problem.”

The court added, “Unlike cases such as [*Orange Empire, supra*,] 259 Cal.App.2d 347, [Kapland and Carter] cannot show that they acted with minimal diligence during this [10-and-a-half-]month period.” In “*People v. One Parcel of Land* (1991) 235 Cal.App.3d 579 . . . the moving party . . . did not speak with her attorney for six months and the court found grounds for equitable relief based on extrinsic fraud. However, in this case almost twice the amount of time has passed without any communication from Mr. Spirtos.”

“The court also note[d] that [Kapland and Carter made] no argument in their moving papers as to their meritorious defenses and claims in this action. (See *Stiles v. Wallis*[, *supra*,] 147 Cal.App.3d [at pp.] 1147-1148 [‘To set aside a judgment based on extrinsic fraud or extrinsic mistake, the moving party must

satisfy three elements: “First, the defaulted party must demonstrate that it has a meritorious case.” ’]; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 315.)” (Italics added.)

Based on the foregoing analysis, the trial court indicated it would deny Kaplan and Carter’s motion for relief from default and default judgment. The court took the matter under submission until November 9, 2017 to allow the parties time to try to reach a settlement.

Kaplan and Carter paid the outstanding sanctions of \$2,252 on November 6, 2017. The parties were unable to reach a settlement agreement. On November 21, 2017, the trial court adopted its tentative ruling as the final ruling.

DISCUSSION

I. Denial of Relief Under Section 473, Subdivision (b)

It is Kaplan and Carter’s position that the trial court misinterpreted section 473, subdivision (b). They argue that so long as the motion for relief is made within six months of the default judgment, both the default judgment and the underlying default may be set aside. They claim the authorities on which the trial court relied are no longer valid in light of the 1988 and 1991 amendments to section 473.

It is true that the cases the trial court cited for the proposition that a motion for relief from a default judgment made more than six months after entry of the underlying default is untimely predate the 1988 and 1991 amendments to section 473: *Koski v. U-Haul*, *supra*, 212 Cal.App.2d 640, *Garcia v. Gallo*, *supra*, 176 Cal.App.2d 658, *Monica v. Oliveira*, *supra*, 147 Cal.App.2d 275. However, cases subsequent to the amendments

make clear that these cases remain good law: A trial court has no discretion to set aside a default more than six months after its entry under section 473, subdivision (b), even if the motion for relief is made within six months of the entry of a default judgment. (*Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal.App.5th 267, 273; see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 “[a]fter six months from entry of default, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable”].) Where the court “could not set aside the default, it also could not set aside the default judgment under . . . section 473, because that would be ‘ “an idle act.” ’ [Citation.] ‘ “If the judgment were vacated, it would be the duty of the court immediately to render another judgment of like effect, and the defendants, still being in default, could not be heard in opposition thereto. . . .” ’ [Citations.]” (*Pulte, supra*, at p. 273.)

For this reason, “[w]here . . . a motion to vacate a default judgment is made more than six months after the default was entered, the motion is not directed to the court’s statutory power to grant relief for mistake or excusable neglect under . . . section 473, but rather is directed to the court’s inherent equity power to grant relief from a default or default judgment procured by extrinsic fraud or mistake.’ [Citations.]” (*Gibble v. Car-Lene Research, Inc., supra*, 67 Cal.App.4th at p. 314.)

The amendments to section 473 to which Kaplan and Carter refer affect the timeliness of a request for mandatory relief accompanied by an affidavit of attorney fault. *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294 explained that section 473 “was amended in 1988 to require relief from a default suffered because of attorney error, upon the filing of a proper application

for such relief. It was amended again in 1991 to add the following provision: ‘Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months *after entry of judgment*, is in proper form, and is accompanied by an attorney’s affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.’ (Italics added.)” (*Id.* at p. 297.)

Here, Kapland and Carter did not have an affidavit of attorney fault from Spirtos. Thus, the mandatory relief provision of section 473, subdivision (b), did not apply, only the provision for discretionary relief. Under that provision, the motion for relief filed more than six months after the entry of default was untimely. (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 981; *Pulte Homes Corp. v. Williams Mechanical, Inc., supra*, 2 Cal.App.5th at p. 273; *Sugasawara v. Newland, supra*, 27 Cal.App.4th at pp. 296-297.) The trial court did not err in denying discretionary relief under section 473, subdivision (b).

II. Denial of Relief Pursuant to the Trial Court’s Inherent Equitable Powers

Apart from section 473, the court retains “the inherent authority to vacate a default and default judgment on equitable grounds such as extrinsic fraud or extrinsic mistake. [Citations.]” (*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97.) A motion for relief addressed to the court’s equitable powers may

be made after the time for relief under section 473 has expired. (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 981; *Bae, supra*, at p. 98.)

“ ‘Because of the strong public policy in favor of the finality of judgments, equitable relief from a default judgment or order is available only in exceptional circumstances. [Citation.] [¶] We review the court’s denial of a motion for equitable relief to vacate a default judgment or order for an abuse of discretion, determining whether that decision exceeded the bounds of reason in light of the circumstances before the court. [Citation.] In doing so, we determine whether the trial court’s factual findings are supported by substantial evidence [citation] and independently review its statutory interpretations and legal conclusions.’ [Citation.]” (*Yolo County Dept. of Child Support Services v. Myers* (2016) 248 Cal.App.4th 42, 47; see *Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 981.)

Kapland and Carter contend the trial court abused its discretion in denying them relief on the basis of Spirtos’s positive misconduct. They argue that the court’s finding that their 10-and-a-half-month delay in communicating with Spirtos was unreasonable is error and unsupported by the law; Kapland and Carter cite *Aldrich v. San Fernando Valley Lumber Co., supra*, 170 Cal.App.3d 725, *Daley v. County of Butte, supra*, 227 Cal.App.2d 380, and *People v. One Parcel of Land, supra*, 235 Cal.App.3d 579.

In *Aldrich*, the plaintiff’s case was dismissed on the basis of the plaintiff’s failure to answer interrogatories which had been served on his attorney, and to which he did not respond. (*Aldrich v. San Fernando Valley Lumber Co., supra*, 170 Cal.App.3d at pp. 730-731.) Almost three years later, the plaintiff, represented

by a new attorney, moved to set aside the dismissal. He presented evidence he was unaware that his previous attorney had been suspended from the practice of law, and he had no notice of the interrogatories or that his case had been dismissed. (*Id.* at p. 732.) When the plaintiff hired the new attorney in an attempt to locate the previous attorney, they discovered the dismissal. (*Ibid.*) The plaintiff's wife documented her attempts to locate the previous attorney over a period of a year-and-a-half. A year later, she contacted the new attorney because she was concerned that they were approaching the five-year period in which to bring the case to trial. (*Id.* at pp. 733-734.) The trial court granted the plaintiff's motion for relief from the dismissal based on its inherent equitable powers. (*Id.* at pp. 735-736.) The defendants appealed. (*Id.* at p. 730.)

On appeal, the court clarified that the ground for relief in the case was extrinsic mistake, based on the previous attorney's positive misconduct which obliterated the attorney-client relationship. (*Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d at pp. 738-739.) The critical question was whether the plaintiff presented a satisfactory excuse for not following the case more closely and learning that the attorney had been suspended and the case dismissed. (*Id.* at p. 738.)

The court observed: "As Justice Friedman so aptly and clearly stated, in *Daley v. County of Butte*, *supra*, 227 Cal.App.2d at page 392: 'Clients should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers. The legal profession knows no worse headache than the client who mistrusts his attorney. The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are the

cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane pretrial rites. He does know this much: that several years frequently elapse between the commencement and trial of lawsuits. Since the law imposes this state of puzzled patience on the litigant, it should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel.’” (*Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d at p. 739.)

The court acknowledged that “[t]he client’s own negligence in following up and pursuing his case is also scrutinized, even in cases of positive misconduct on the part of the attorney. (See *Orange Empire . . .*, *supra*, 259 Cal.App.2d at p. 355.) It is undeniable in the case at bench that plaintiff did not assiduously seek out his attorney. But, as has been pointed out, a client should not be required to act as a ‘hawklike inquisitor’ of his own counsel, nor perform incessant checking on counsel. (*Daley v. County of Butte*, *supra*, 227 Cal.App.2d at p. 392.) [¶] Moreover, it has been held that where the aggrieved party makes a strong showing of diligence in seeking relief after discovery of the facts, and the other party is unable to show prejudice from the delay, the original negligence in allowing the default to be taken will be excused on a weak showing. [Citations.]” (*Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d at pp. 739-740.) The court found a delay of 21 days in filing the motion for relief after learning of the dismissal was not unreasonable. (*Id.* at p. 740.)

The court concluded: “A review of the clerk’s and reporter’s transcripts, establishes that the trial court acted judiciously and with great care in making its decision on the motion to set aside judgment. When the matter was first before the court the judge continued it for three weeks in order to obtain further declarations in support of the motion. The reporter’s transcript reflects that the court had done considerable research and study before the date of the second hearing, when the order vacating judgment was made and filed. The court’s actions and decision fully comport with the standards for sound judicial discretion set forth in the opinions of our Supreme Court. [¶] In light of the positive misconduct and abandonment of his client by [the plaintiff’s] counsel, the promptness with which [the plaintiff] moved for relief upon discovery of the dismissal, and the lack of showing of prejudice, plaintiff’s showing of diligence is sufficient. We find that the trial court did not abuse its discretion and did not err in vacating the order of dismissal.” (*Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d at pp. 740-741.)³

The situation here is similar. Spirtos repeatedly failed to respond to discovery requests or to notify Kaplan and Carter of the requests. After lulling them into a state of security by assuring them that he would provide affirmative updates in order to keep them from incurring unnecessary legal fees, he promptly

³ In *People v. One Parcel of Land*, *supra*, 235 Cal.App.3d 579, the court did not analyze whether the owner of the property acted reasonably in not attempting to contact her attorney in the six months prior to entry of the default judgment. It only found she was diligent in seeking to set aside the default once she learned of it. (*Id.* at p. 584.)

abandoned them, failing to respond to the final discovery request, sanctions order, or motion for terminating sanctions. His actions “amounted to ‘positive misconduct,’ by which [Kapland and Carter were] ‘. . . unknowingly deprived of representation.’ [Citation.]” (*Carroll v. Abbott Laboratories, Inc.*, *supra*, 32 Cal.3d at pp. 898-899.)

Additionally, the 10-and-a-half month period in which Kapland and Carter had no contact with Spirtos was far shorter than the period in which the plaintiff in *Aldrich* had no contact with his previous attorney. There were no looming deadlines which should have alerted Kapland and Carter to Spirtos’s misconduct. (See, e.g., *Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d at pp. 733-734.) During what was, in actuality, a relatively brief period of time in the course of civil litigation (see *id.* at p. 739), Kapland and Carter should not have been “forced to act as hawklike inquisitors of their own counsel,” incessantly checking up on him (*Daley v. County of Butte*, *supra*, 227 Cal.App.2d at p. 392; accord, *Aldrich*, *supra*, at p. 740) and incurring legal fees for the sole purpose of monitoring his actions.

As in *Aldrich*, Kapland and Carter acted promptly upon learning of the default judgment. Kapland immediately attempted to contact Spirtos and to retain new counsel. Within a month, Attorney Anderson had substituted into the action and obtained a stay in order to file a motion for relief from judgment. Kapland and Carter thus demonstrated a satisfactory excuse for not presenting their defense and diligence in seeking to set aside the default judgment once they discovered it had been entered against them. (*Stiles v. Wallis*, *supra*, 147 Cal.App.3d at pp. 1147-1148.) In light of Spirtos’s positive misconduct and abandonment of his clients, the promptness with which Kapland

and Carter acted upon discovery of the default judgment, and the lack of showing of prejudice, we conclude the trial court abused its discretion in denying Kapland and Carter equitable relief from the judgment. (*Aldrich v. San Fernando Valley Lumber Co.*, *supra*, 170 Cal.App.3d at pp. 740-741.)

Kapland and Carter also provided evidence of a meritorious case. (*Stiles v. Wallis*, *supra*, 147 Cal.App.3d at p. 1148.) “In this context, only a minimal showing is necessary. [Citation.] The moving party does not have to guarantee success, or ‘demonstrate with certainty that a different result would obtain. . . . Rather, [it] must show facts indicating a sufficiently meritorious claim to entitle [it] to a fair adversary hearing.’ [Citation.]” (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1246.)

Kapland and Carter filed both an answer to Bethco’s complaint and their own cross-complaint. They identified the disputes they had with Bethco regarding Bethco’s performance under the contract and the amount Bethco was seeking to recover from them. They alleged that they performed their duties under their contract with Bethco except those excused by Bethco’s breach of contract. In addition, Kapland provided a declaration to the same effect. These were sufficient to demonstrate a meritorious case. (See *Mechling v. Asbestos Defendants*, *supra*, 29 Cal.App.5th at pp. 1246-1247.) The trial court’s order denying Kapland and Carter relief must therefore be reversed.⁴

⁴ In light of this conclusion, we need not address Kapland and Carter’s contention that they were entitled to relief under section 473, subdivision (d), on the ground the default judgment was void.

DISPOSITION

The order denying Kaplan and Carter's motion for relief from judgment is reversed. The trial court is directed to enter a new order granting the motion. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.